the Advocate
LEGAL NEWSLETTER
April 2014 - Issue No. 39

LEONARD S. DEPALMA, LLC
Attorney at Law

973-837-1488
ldepalma@advocate.org
www.advocate.org

Land Owner's Rights When Building Permits Are Issued in Error

… Continued from Our November 2013 and February 2014 Issues

In the aftermath of the Hill decision, there have been numerous reported cases that have cited Hill as precedent. For example in Camden v. Dicks, 135 N.J. Super. 559 (Law Div 1975) which involved a collective bargaining agreement, the Law Division noted that "[o]ur courts have already recognized the '***strong recent trend towards the application of equitable principles of estoppel against public bodies where the interests of justice, morality and common fairness clearly dictate that course.***'" Citing Gruber v. Raritan Tp., Mayor & Tp. Comm., 39 N.J. 1, 13 (1962); and Hill v. Eatontown Bd. of Adjust., 122 N.J. Super. 156, 164 (App. Div. 1972). ***Emphasis ours***.

In another case, Trenkamp v. Burlington, 170 N.J. Super. 251 (Law Div. 1979), a building permit was issued to Defendants Buzzi on July 2, 1977 for the construction of a building described in the application as "Butler farmstead building, 36 ft. X 50 ft." Construction of the building began on August 17, 1977. By August 23 sidewalls, side supports and roof beams were in place; by August 27 the roof and walls were covered, and by August 31 the exterior had been completed. A certificate of occupancy for the building was issued on September 3.

At the time the permit was issued the pertinent part of the township's zoning ordinance read as follows:

> 16:3-2(21) Garage, Private. A building or space accessory to a residence which provides for the storage of motor vehicles and in which no occupation, business or service for profit is carried on. * * *
>
> 19:6-1(2) Permitted Accessory Building and Structures.
>
> (a) Private garages and car ports. * * *
>
> (e) Storage buildings of 200 square feet or less in area.

Plaintiffs filed a Complaint seeking removal of the building on various grounds including the fact that the township building inspector had issued the permit in violation of the zoning ordinance. The Trenkamp court discussed the principal of estoppel in detail:

> The fountainhead of modern discussion concerning when a municipality is estopped from revoking a building permit is Chief Justice (then Judge)

Continued on reverse page ...

New Conditional Dismissal Program

A new law (P.L. 2013, c.158) which takes effect January 4, 2014 (applicable only to persons who commit a disorderly persons or petty disorderly persons offense on or after that date) establishes a conditional dismissal program (CDP) in the municipal courts for eligible first-time defendants charged with certain offenses. The program compliments existing criminal justice diversion programs such as pretrial intervention (PTI) for certain indictable offenses in Superior Court under N.J.S.A. 2C:43-12 et seq. and conditional discharge for certain disorderly persons drug offenses in the municipal courts under N.J.S.A. 2C:36A-1.

Under the law, a defendant charged with a petty disorderly persons offense or a disorderly persons offense may apply to enter into the CDP, provided that the person (1) has not been previously convicted of any petty disorderly persons offense, disorderly persons offense or crime and (2) has not previously participated in the conditional discharge, conditional dismissal, or PTI programs. Certain offenses are ineligible to be considered for participation in the CDP, such as offenses involving domestic violence or driving under the influence of alcohol.

out of order

"That men do not learn very much from the lessons of history is the most important of all the lessons that History has to teach."

- Aldous Huxley

"History is a vast early warning system."

- Norman Cousins

© 2014 Leonard S. DePalma LLC

Building Permits Issued in Error

... Continued from first page

Weintraub's opinion in *Jantausch v. Verona, 41 N.J. Super. 89 (Law Div.1956)*, aff'd *24 N.J. 326 (1957)*. *Jantausch* asserts that the applicability of the estoppel defense depends upon the circumstances surrounding the issuance of the permit. For the purpose of evaluating estoppel contentions *Jantausch* segregates all permits into three distinct categories. At the one extreme, a permit validly issued cannot be revoked after reliance, absent fraud. At the other extreme, a permit invalidly issued without any "semblance of compliance with or authorization in the ordinance," *id. at 94*, not only can be revoked after reliance, but also collaterally attacked after the period for direct review has expired. The middle ground is occupied by those permits issued in good faith but based upon an erroneous, though arguably correct, interpretation of the zoning ordinance. The permit at issue in this case is of the last type.

Although it was not clear at the time *Jantausch* was decided whether a municipality would be estopped from revoking a permit within this latter category, see *Saddle River Country Day School v. Saddle River, 51 N.J. Super. 589, 606 (App.Div.1958)*, aff'd *29 N.J. 468 (1959)*; *Esso Standard Oil Co. v. North Bergen Tp., 50 N.J. Super. 90, 95-96 (App.Div.1958)*, ***it is clear from subsequent cases that the municipality is estopped when there has been reliance***, see *East Hanover Tp. v. Cuva, 156 N.J. Super. 159, 165-66 (App.Div.1978)*; *Howland v. Freehold, 143 N.J. Super. 484* (App.Div.) *certif.* den., *72 N.J. 466 (1976)*; *Hill v. Eatontown Bd. of Adj., 122 N.J. Super. 156 (App.Div.1972)*. In light of the foregoing, the township and its building inspector would be estopped from revoking the Buzzi's permit, a clear defense to the enforcement of any order of revocation. That defense has been raised here. Consequently, the court will not order the building inspector or the municipality to undertake this useless task. See *Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493 (1955)*. ***For the same reason, the municipality would be estopped from commencing an action for a mandatory injunction to compel removal of the structure that allegedly violates the zoning ordinance.*** See *Alpine Borough Mayor and Council v. Brewster, 7 N.J. 42 (1952)*. Id. at 271 - 272. ***Emphasis ours.***

Another case, Winn v. Margate, 204 N.J. Super. 114 (Law Div. 1985), cites the decision in Hill, supra *122 N.J. Super. 156 (App.Div.1972)*, and provides further elucidation regarding the application of the principal of estoppel:

> As the cases make clear, whether or not estoppel will be applied depends first on whether the action involved is found to have been ultra vires.
>
> Stated differently, certain actions by municipal officials, although erroneous, are said to be beyond the statutory power of the official and are thus "void." Such acts, even when undertaken in good faith, are beyond the relief afforded by estoppel. On the other hand, where the erroneous action is taken, not only in good faith but also within the ambit of the official's duty, it is not deemed "void" and thus estoppel is applicable. Such reliance, however, must be reasonable and in good faith. Hill v. Board of Adjustment, supra, 122 N.J. Super. at 152. An additional element was added in Howland where it was held that there must also be "the appearance of some reasonable basis for the issuance of the permit." Howland v. Freehold, supra, 143 N.J. Super. at 490 [App.Div. 1976].

Regarding the "no discernable damage" standard found in Hill, supra *122 N.J. Super. 156 (App.Div.1972)*, the Court in Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 187 (2003) expounded as follows:

> Judge Lynch in Hill correctly pointed out that the difference between a side yard of four feet instead of seven feet to the next door neighbor suing to have the completed addition built by Mr. Hill taken down created "no discernable damage" to the next door neighbor, especially when the Board of Adjustment in Eatontown found that particular side yard violation was present in "many properties in the neighborhood." Id. at 164, 299 A.2d at 741. Id. at 200 -201.

The facts in Grasso involved Plaintiff, a professional builder and plaintiff's professional planner who "made a mistake" by applying for a building height of twenty-eight feet, two and one-half inches, when in fact, the building height as expressly defined by the ordinance was in excess of thirty-eight feet. The nearly ten foot height differential was too great to have met the "no discernable damage" standard set forth under Hill and, accordingly, the court in Grasso ruled that the doctrine of equitable estoppel did not apply. Thus, the Court refused to enjoin the Borough from rescinding the permits, and the building permits were deemed null and void.

... To Be Continued in Our Next Issue

This newsletter provides general information and is not intended to be used or taken as legal advice as to actual situations which require evaluation of unique factual circumstances. If you believe this newsletter is inaccurate or misleading, you may report same to the Committee on Attorney Advertising, Hughes Justice Complex, CN 037, Trenton, NJ 08625.